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No. 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

VIVIAN F. BALDWIN and E. R. BALDWIN,
Petitioners,

vs.

AMERICAN SURETY COMPANY OF NEW YORK,
a Corporation,

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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Brief for Petitioners

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Counsel for Petitioners.

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Brief for Petitioners

OPINIONS BELOW

The opinion of the Supreme Court of Idaho is reported in Baldwin v. Anderson and Am. Surety Co., 50 Idaho 606.

The opinion of the Ninth Circuit Court of Appeals is reported in 55 Fed. (2d) 555.

The opinion of the United States District Court for the District of Idaho is reported in 51 Fed. (2d) 596.

The opinions of the Supreme Court of Idaho in two other proceedings by respondent, had in the State courts concerning the subject matter here involved (a State court judgment against this respondent) and in part relied on by petitioners here to show a waiver of lack of due process, if any existed, are reported as follows:

Baldwin v. Anderson, et al., ... Idaho .....
(Not yet officially reported.) 8 Pac. (2d) 461.
Baldwin v. Anderson, et al., ... Idaho .....,
..... Pac. (2d) .....
(Final judgment September 10, 1932.)

JURISDICTION

The Circuit Court of Appeals entered judgment herein January 18, 1932.

Petition for certiorari was filed March 21, 1932. The writ was granted April 25, 1932.

Jurisdiction is thought to be conferred by Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938.

QUESTIONS PRESENTED

As to whether the Circuit Court of Appeals erred in refusing to follow the rules of State law announced by, and the decision of, the Supreme Court of Idaho on the question as to construction, meaning and effect of a supersedeas undertaking filed in an Idaho trial court in conjunction with an appeal from a money judgment therein to the State Supreme Court; on the further question, as to the effect of filing the same as making the obligor thereunder a party to subsequent proceedings; and on the question of the jurisdiction of the State trial court to entertain, thereafter, a motion for judgment on such undertaking without further or special notice to the obligor who had theretofore executed and filed the same.

Also, as to whether the Circuit Court of Appeals was in error in holding that such motion for judgment was entertained, and thereafter the undertaking construed and judgment entered thereon, without due process of law.

Also, as to whether the Circuit Court of Appeals failed to give full faith and credit to the judgments of the State courts.

STATUTES INVOLVED

The statutes are reproduced in Appendices A, B and C, *infra*, pp.

STATEMENT

Petitioners commenced an action for damages in the District Court of Ada County, State of Idaho, against the Singer Sewing Machine Company and Ed Anderson, which resulted in the entry of judgment, May 31, 1928, in favor of petitioners and against defendants Singer Sewing Machine Company and Ed Anderson, jointly, with no several liability adjudged against either of them. (R. 33) Thereafter, on August 27,

1928, the said two defendants gave a *joint* (not joint and several) notice of appeal to the Supreme Court of Idaho, which notice recited that the appeal was from the judgment "* * * and from the whole thereof." (R. 35)

Two days later, the American Surety Company (respondent herein) appeared in the action and filed its supersedeas undertaking, pursuant to Section 7155, Idaho Compiled Statutes, (Appendix A) conditioned that whereas the joint appeal was from the *whole* of the judgment, execution should be stayed as to the judgment *so appealed from* and that "* * * if the said judgment appealed from, or any part thereof, be affirmed * * *" the said judgment would be paid; and if not paid within thirty days after the filing of the remittitur of the Supreme Court of Idaho "* * * judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum* * *." (R. 19)

This undertaking was not the ordinary contract of principal and surety and was not signed by any one as principal (R. 21) but was, as construed by the Supreme Court of Idaho, "* * * a complete, independent contract. The obligation of its maker (the surety company) is not collateral or secondary." (R. 52) Upon appeal to the Supreme Court of Idaho, the judgment was affirmed as to the defendant Anderson and reversed as to the Singer Sewing Machine Company, (Baldwin v. Singer Sewing Machine Company, et al., 49 Idaho 231) remittitur being filed in the trial court May 22, 1930. (R. 26)

June 23, 1930, (more than thirty days having elapsed since the filing of the remittitur and the judgment being unpaid) petitioners appeared and moved the trial court to enter judgment in their favor and against the American Surety Company, which motion was granted and judgment was entered in favor of petitioners and against the American Surety Company in the sum of $22,357.20, together with interest thereon, and a provision "* * * that the plaintiffs have execution therefor." (R. 24) Execution was immediately issued and levied by the sheriff of Ada County the following day.

Three days later, the American Surety Company, through its counsel, appearing generally, (R. 35, 36, 39) moved to vacate and set aside the judgment upon the grounds that it was void, that its enforcement was contrary to good conscience and equity, and that the judgment was entered without notice to the American Surety Company or the Singer

Sewing Machine Company. (R. 36) In the same instrument the surety company moved the court to stay all proceedings under execution upon said judgment. (R. 38) The motion was made and based upon all the records and files in the action and a copy of the supersedeas undertaking attached to the motion. (R. 38-39) August 12, 1930, the trial court entered an order declaring the said judgment of June 23, 1930, void, and quashing the execution proceedings thereunder, from which petitioners appealed to the Supreme Court of Idaho. (R. 42)

Upon that appeal to the Supreme Court of Idaho, the surety company stipulated as to the papers to be included in the transcript on appeal, and stipulated to the correctness of the transcript. (R. 43-46) In the Supreme Court of Idaho, the American Surety Company, appearing generally, submitted the cause orally and upon briefs. (Baldwin v. Anderson, 50 Idaho 606, 613.) Thereafter the Supreme Court of Idaho, Justice McNaughton delivering the opinion, rendered its judgment, reversing the trial court, declaring the supersedeas undertaking was the complete, independent contract of the surety, and not collateral or secondary, and declaring that the judgment of June 23, 1930, was not void. (R. 47) The surety company's petition for rehearing was denied and the remittitur of the Supreme Court filed in the trial court June 3, 1931. (R. 65)

On June 17, 1931, respondents again caused to be issued a general execution against the American Surety Company (R. 94) pursuant to which United States bonds in the sum of $25,000.00 deposited by the surety company with the treasurer of the State of Idaho, as provided by law, were levied upon and sale of the same to satisfy execution was set for August 5, 1931. (R. 92) The long period elapsing between the date of the execution and date of sale was due to Section 5104, Idaho Compiled Statutes, (R. 96) which requires that securities deposited with the State Treasurer by a foreign surety company cannot be sold until 40 days' notice is given to the surety at its home address.

Upon the day following the issuance of the execution, the surety company filed in the State District Court a motion *to amend and correct the judgment* of June 23, 1930, and to vacate said judgment as amended. (R. 69) In this proceeding the surety company again appeared generally (R. 69, 72)

and supported its motion by a lengthy showing of fact, going into the whole proceeding which led to the entry of judgment against it. (R. 72-91)

The bill of complaint herein was not filed in the United States District Court for the District of Idaho until July 6, 1931. (R. 1) It prayed for an injunction against petitioners *and the sheriff of Ada County, Idaho*, restraining them from levying or attempting to levy upon any property of the American Surety Company or otherwise attempting to collect the judgment of June 23, 1930, (R. 16) and allegations were made that the decision of the Supreme Court of Idaho, dated May 2, 1931, was erroneous (R. 10) that the said judgment of June 23, 1930, was void for want of jurisdiction, and that according to the conclusions of the pleader, petitioners had committed fraud in merely presenting their motion for judgment. (R. 6) July 13, 1931, the motion to amend and vacate the judgment was overruled and denied by the state trial judge (R. 132-133) and on the same day a notice of appeal to the Supreme Court of Idaho from the said judgment of June 23, 1930, was served and filed by the surety company. (R. 122) Two days later the surety company served and filed its notice of appeal to the Supreme Court of Idaho from the order denying its motion to amend and vacate the judgment. (R. 126) In all of these proceedings, the surety company appeared generally. No supersedeas or undertaking to stay execution of the judgment on appeal to the Supreme Court of Idaho was filed, although the Idaho statutes permitted the company to do so as a matter of right; Section 7155, Idaho Compiled Statutes. (Appendix A)

The surety company's motion for temporary injunction was heard July 28, 1931, (R. 192) in the United States District Court, after the surety company's appeal from the state court judgment had been taken and after its motion in state court to amend that judgment had been denied and it had taken a second appeal from that denial to the Supreme Court of Idaho. (R. 122, 126) The hearing was had upon the bill of complaint, (R. 1) petitioners' (defendants therein) showing in opposition thereto, (R. 29) and the surety company's rebuttal showing, as well as upon petitioners' motion to strike from the bill (R. 146) and motion to dismiss. (R. 144) On July 31, 1931, Federal Judge Cavanah handed down his memorandum opinion (American Surety Company v. Baldwin,

51 Fed. (2d) 596) (R. 183) and in conformity therewith, on August 1, 1931, entered an order denying the surety company's motion for a temporary injunction and sustaining and granting defendants motion to strike and granting defendants motion to dismiss the bill of complaint. (R. 192) The same day, upon the refusal of the surety company to plead further, a final decree was entered, dismissing the bill with prejudice, (R. 194) from which appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit. (R. 206)

August 14th, 1931, on application of the surety company (R. 223), and over the objections of your petitioners,, (R 232) the Circuit Court of Appeals entered a temporary restraining order pending appeal. (R. 236)

January 18, 1932, the Circuit Court of Appeals filed its opinion and judgment reversing the trial court's final decree of dismissal, and directing that a temporary injunction be issued by the trial court. (R. 250, 266) The order of the trial court, sustaining the motion to strike from the complaint was not, however, disturbed.

In reversing the lower court, the Circuit Court of Appeals in effect expressly reversed the decision of the Supreme Court of Idaho of May 2, 1931, in the following language:

> "This view is inconsistent with the decision of the Supreme Court of Idaho, but the majority of the court there assumed upon the appeal in question that the surety was in court at the time of the hearing of the motion for judgment against it and that therefore the court not only had jurisdiction of the subject matter of the judgment but of the parties and that its decision, although erroneous, was not void." (R. 260)

The Circuit Court of Appeals further held that the Singer Sewing Machine Company was the principal in the supersedeas under consideration (R. 260), in conflict with the construction placed upon Section 7155, Idaho Compiled Statutes, by the Supreme Court of Idaho, which held that the contract of the surety was a separate, independent obligation of the surety company through which it made its voluntary appearance in the State District Court and thereby became a party to all proceedings thereafter. (R. 52) The Circuit Court of Appeals further held that the giving of judgment

was "in violation of the Federal Constitution" (R. 260), and declined to give full faith and credit to the judgment of the Supreme Court of Idaho, (R. 256) or consider the decision of the Supreme Court of Idaho *res judicata*.

Petition for rehearing was filed in the Circuit Court of Appeals which was denied February 23, 1932 (R. 266), and upon application (R. 267) a stay of mandate was ordered. (R. 268)

SPECIFICATIONS OF ERRORS TO BE URGED

I.

The Circuit Court of Appeals erred in refusing to accept and follow the interpretation and rules of State law announced by the Idaho Supreme Court in its decision.

II.

The Circuit Court erred in refusing to accept the judgment of the State trial court, which was unmodified and unreversed, and which is now a final judgment, as res judicata concerning the construction, meaning and effect of this respondent's contract.

III.

The Circuit Court erred in holding, in effect, that Federal courts may review the decisions of State courts for error in matters of State law and statutes.

IV.

The Circuit Court failed to give full faith and credit to the judgment of the Idaho Supreme Court, and to the judgment of the State trial court.

V.

The Circuit Court erred in holding that the judgment here in question was entered without due process of law.

VI.

The Circuit Court erred in failing to hold that, if there were any lack of due process originally, the respondent had waived it and submitted to the jurisdiction of the State courts for all purposes of the proceedings therein.

SUMMARY OF ARGUMENT

Assignments of Error I-IV

The supersedeas undertaking in question accompanied a strictly joint appeal to the Idaho Supreme Court from a joint judgment in the original case, which in no sense adjudged a several liability against either judgment debtor. (R. 33-35)

Doremus v. Root, 23 Wash. 710.

The State Supreme Court took note that the *nature* of that appeal was one of the premises on which the next appeal, from the judgment on the supersedeas undertaking, was there presented. (R. 50) This last is the judgment involved here.

The judgment debtors in the original case were privileged to stay execution pending that appeal solely because of a State statute, Idaho Comp. Statutes, Section 7155. (App. A) The American Surety Company, respondent here in this, Case No. 21, likewise exercised a privilege extended to it by the same statute. Presumably for a monetary consideration which it deemed sufficient, it executed its contract running to the judgment creditors (petitioners here) which the statute denominates a "supersedeas undertaking". That contract discloses on its face that it was the obligation of the American Surety Company alone. (R. 21) Accordingly, the State Supreme Court held that the undertaking was the independent contract of the surety, and that the obligation thereof was neither collateral nor secondary. The court also cited in support of that rule the California court, from which state Idaho's Section 7155 was adopted. (R. 52)

The Idaho court also held that by filing its supersedeas undertaking in the case, the surety company became a party to the action, and cited numerous decisions, both State and Federal, to the same effect. (R. 51-52)

We submit that the proceedings provided by the Idaho statute (App. A) pertain wholly to the State courts, and have neither reference nor relation to, nor depend upon, the Federal law, either constitutional or statutory. A contract such as the undertaking in question, exists and has its effect wholly by virtue of State law. The filing thereof in the case, and subsequent action taken therein with reference thereto, are matters of procedure in the State courts. We therefore submit that the State courts were fully empowered to consider

and determine the legal meaning and effect of the terms of that undertaking, and to determine, *as between the parties to that litigation,* whether or not the surety company's obligation rendered it liable thereon.

The facts, we believe, bring the case within the rule announced by this court in Ramsey-Gatlin Const. Co. v. Vincennes Bridge Co., 283 U. S. 796, where it was said:

> "*Per Curiam:* As it appears from statements at the bar that the contract herein and the bond given pursuant thereto were made and the obligations thereof were to be performed within the State of Kentucky, and as the bond should be construed in accordance with the law of that state, and it appearing that, since the certification herein, the Court of Appeals of Kentucky has construed the bond in question and decided that one in the position of the appellee in the court below, as a sub-contractor, was entitled to avail itself of the provision in the bond and maintain its action (*Aetna Casualty & Surety Co. v. Wheeler & Putnam Co.,* decided March 27, 1931, 236 Ky. .....) the Court is of opinion that there is no occasion for an answer by the Court to the question propounded in the certificate."

Further, we think it is obvious that the State trial court, being the only court in which the undertaking *could* be filed, and in which it reposed during the appeal to the Supreme Court, and to which the State statute required the judgment creditor to address his application for judgment on the undertaking, *was the only court in existence which had any vestige of jurisdiction to consider and judicially determine the meaning and effect of the contract* between the surety and the judgment creditors.

After entering judgment on the contract, the trial court, on the surety company's motion, declared such judgment void, and ordered it vacated. The State Supreme Court reversed that order. The surety company then commenced this suit to enjoin enforcement of the judgment.

The Circuit Court of Appeals stated in its decision, with reference to such decision of the Idaho Supreme Court, as follows:

> "This decision was based on the proposition *that the trial court had no jurisdiction to set aside its judgment*"

(against the surety company) "under the circumstances ****". (R. 252)

This, we submit, was entirely a misconception. The closing words of the State court's opinion are, "the trial court committed *error* ****". (R. 56) The order of the trial court had been that the judgment against the surety was *void*. (R. 41) We believe it is universally settled that any trial court has jurisdiction to consider and determine whether or not its judgment is void, as distinguished from erroneous.

And see:

Nixon v. Tongren, 33 Idaho 287;
Armitage v. Horseshoe Bend Co., 35 Idaho 179.

The Circuit Court of Appeals further held that the Singer Company was the principal in the supersedeas undertaking and the surety company merely its surety, stating that the obligation and liability of the surety company on its contract was confined to a judgment against it

"in the event that the judgment *against its principal* was affirmed". (R. 258)

This was strictly in conflict with the decision of the State Supreme Court, above referred to, that the undertaking was the independent contract of the surety company and the liability of the surety company thereunder was therefore neither secondary nor collateral. The State court plainly distinguished the contract in question from the ordinary contract of suretyship, executed by a principal as the primary obligor, and by another as surety and hence a secondary obligor, merely. It also held that the contract presented *a legitimate question for judicial determination* as to liability thereunder. (R. 55-56)

The Circuit Court also held that, under the law of Idaho concerning procedure in the Idaho State courts, the reversal of the original judgment as against the Singer Company worked an automatic dismissal of the surety company from the action, by operation of State law. (R. 258, 260) We say "State law" because none other was there involved. The Circuit Court, in this connection, referred to the Idaho Supreme Court as having merely *assumed* that the surety was still a party to the proceedings at the time judgment against it on

its undertaking was rendered. (R. 260) This also is in direct conflict with the holding of the State court. That court said that the surety company had contended, when in the State Supreme Court,

> "that upon the action being dismissed as to it" (the Singer Company) "such dismissal was also a dismissal as to the surety company. *We cannot accept this view.* The undertaking is a complete independent contract. The obligation of its maker is not collateral or secondary. *Moffat vs. Greenawalt,* (Cal.) 27 Pac. 296. Its obligations are to be determined from the instrument itself. If the contract stayed the whole judgment and promised in consideration thereof to pay any part thereof affirmed in the Supreme Court which remained unpaid thirty days after the remittitur was filed, it remains a party to the action and liable until that obligation is satisfied". (Emphasis ours.)
>
> (R. 52)

The State Supreme Court further said, speaking of the proceeding in the trial court for judgment against the surety:

> "The question or issue presented was, Did the surety company, in its undertaking, become a party liable for every part of the judgment appealed from which might be affirmed by the Supreme Court, or did it stipulate only as to such judgment or part thereof as might be affirmed against the Singer Sewing Machine Company? To answer this question the court must look to the bond. The issue required a construction of the bond as a whole. The trial court had jurisdiction of this question. It construed the bond in favor of appellants and against the surety company. It was not only in the court's power, but it was its duty, to decide the question submitted". (Citing authorities.)

In short, the State Supreme Court held that the Singer Company was not the principal of the surety company in the contract in question, that the surety company's obligations under that contract were to be determined from the undertaking itself and were not necessarily controlled by the reversal of the primary judgment against the Singer Company; that the surety company had become a party to the action

upon coming into court *at the time of filing* its undertaking, and remained a party until the question of its liability on the contract was determined. It also held that because of this, it was not necessary to give notice to the surety company of the subsequent motion for judgment against it, in the lower court. In these holdings the court was supported by like decisions where the same, or a similar, statute has been considered.

Gray v. Cotton, 174 Cal. 256;

Portland Trust Co. v. Havely, 36 Ore. 234;

Jewett v. Shoemaker, 124 Iowa 561;

Meredith v. S. C. M. A. of Baltimore, 60 Cal. 617;

Hawley v. Gray Bros., etc. Co., 127 Cal. 560;

Shannon v. Dodge, 18 Colo. 164.

The Ninth Circuit Court of Appeals has held likewise.

U. S. F. & G. Co. v. Fort Misery Highway District, 22 Fed. (2d) 369, 373.

The Federal District Court for Idaho followed the Ninth Circuit Court of Appeals.

American Surety Co. v. Baldwin et al., 51 Fed. (2d) 596.

And see:

Pease v. Rathbun-Jones Eng. Co., 243 U. S. 273, 279.

The cases there cited were, in principle, the same as the case at bar. They were:

United Surety Co. v. Am. Fruit Prod. Co., 238 U. S. 140;

Johnson v. Chicago & P. Elev. Co., 119 U. S. 388, 400-401.

The Circuit Court of Appeals has unquestionably, we submit, reviewed and reversed the decision of the Idaho Supreme Court. If so, we believe it was not so authorized.

"Lower Federal courts are not superior to State courts."

Lion Bonding & S. Co. v. Karatz, 262 U. S. 77;
Nickel v. Cole, 256 U. S. 222;
Enterprise Irr. Co. v. Farmers, etc. Canal Co., 243 U. S. 157;
Fauntleroy v. Lum, 210 U. S. 230;
Arrowsmith v. Harmoning, 118 U. S. 194;
Grignon v. Astor, 2 How. 319.

State courts may place their own construction on the *effect* of a given step taken in an action, *particularly as to the effect of an appearance* in the case.

Kauffman v. Wooters, 138 U. S. 285.

The Federal courts do not review or revise the decisions of State courts. Such judgments are res judicata.

A judgment once rendered, though erroneous, is binding *on the parties thereto.* "In every other forum the reasons for passing the decree are wholly immaterial."

Deposit Bank v. Frankfort, 191 U. S. 499, 512.

Any *right, question or fact* once determined "must be taken as conclusively established". *This is true whether the court of first jurisdiction is a State or a Federal court.*

Idem., Pages 514-516.

"A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit *between the same parties or their privies,* and even if the suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified". (Emphasis ours.)

Mitchell v. First National Bank, 180 U. S. 471.

"If it were true that the question were in whole or in part one of general law, then the thing adjudicated by the State court, when properly brought to the attention of the" (Fed-

eral) "circuit court would still be conclusive *between the same parties* or their privies." (Emphasis ours.)

Idem., Page 481.

"*Whatever may be the nature of a question* presented for judicial determination—whether depending on Federal, general or local law—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject matter *binds the parties* and their privies so long as the judgment remains unmodified and unreversed."

Idem.

And see also:

Southern Pac. R. Co. v. United States, 168 U. S. 1.

A final judgment on the merits in a State court is conclusive in the Federal courts as between the parties or their privies, whether the question determined is one of Federal, general or local law.

This is true of any judgment, for instance, of one rendered on demurrer, as much so as if rendered on proof.

The judgment of the State court forecloses all that was litigated and all that might have been under the pleadings and the issues.

Sperry & Hutchinson Co. v. Blue, 202 Fed. 82 (C. C. A.), citing many authorities.

One cannot, in another action in a different court, *deny a jurisdiction to which he formerly submitted himself.*

McGeon v. Scales, 9 Wall. 23.

We think the foregoing authorities demonstrate that the Circuit Court of Appeals was in error in reviewing and reversing the State court, particularly since such review involved, and such reversal depended upon, the Circuit Court's refusal *to accept the rules of State law* announced in the State court's decision, which pertained entirely to the State statute and to the law of procedure in the State courts.

Nor is there any distinction to be drawn between this case and others, from the proposition that the judgment against the surety company was a consent judgment, if indeed it may properly be termed such. Assuming that it may, in spite

of the fact that the procedure and the judgment was fixed and authorized by a State statute rather than by the voluntary act of the surety company, still the situation is not altered. We should perhaps interpolate at this point, that we are not directing this portion of the brief specifically to the question of due process. While we believe the authorities which we here cite, particularly the decisions of this court, have an important bearing on that question, we deal directly with it in the next section of the brief. Referring now to the matter of consent judgments, we call attention to the following authorities, showing that consent judgments are not materially different from any other, and that if erroneous they are properly to be corrected by appeal or by like proceedings in error, particularly if it be so held by the appellate court of a given State.

A consent judgment "is obviously something more than a contract, being rather the result of a contract and its embodiment in a form *which places it and the matters covered by it beyond further controversy.* ****** Such a judgment is substantially the same as any other judgment rendered in ordinary course, and is entitled to the same presumptions. ****** It is equally conclusive as to the matter adjudicated, is not subject to collateral attack except on jurisdictional grounds, and is entitled to full faith and credit in a sister state." (Emphasis ours.)

Freeman (5th Ed.) Judgments, Sec. 1350.

A judgment on consent is binding, whether it follows the terms of the consent or not.

Semple v. Wright, 32 Cal. 659, 667;

Neilson v. Emerson, et al., 67 Cal. App. 1239.

A consent decree is reviewable on appeal as to whether the consent was in fact given, or as to whether something has been inserted, as by consent, which was not consented to.

Harding v. Harding, 198 U. S. 317, 335.

The fact that a State appellate court holds that a consent decree is reviewable on appeal, is conclusive in the Federal courts.

Idem., Page 336.

Judgment on a supersedeas undertaking, under a statute such as Section 7155 (App. A) is appealable.

Baldwin v. American Surety Co., 50 Idaho 606, 617. (See R. 55)

Hawley v. Gray Bros., 127 Cal. 560, *supra*.

We submit that in the matters hereinabove pointed out, the decision of the Idaho Supreme Court was final, whether correct or erroneous. So, also, was the judgment of the State trial court against the surety company. The only method for correcting error, if any occurred in the lower court, was by appeal as provided by the law of Idaho.

See App. C;

McNitt v. Turner, 16 Wall. 366;

Mohr v. Manierre, 101 U. S. 417;

Thaw v. Ritchie, 136 U. S. 519;

Simmons v. Saul, 138 U. S. 439;

Reinach v. Atl. etc. R. Co., 58 Fed. 43.

Finally, we submit that the Circuit Court of Appeals in part misconceived, and in part definitely refused to accept, the law of the case as theretofore announced in the opinion of the State court, and because of that, misconceived the judgment of the Idaho Supreme Court, *which followed from the rules of law announced in its decision*. We submit that thus the Circuit Court reached a conclusion and a judgment in conflict with the Idaho court, and so failed to give full faith and credit to the State court judgment. If so, the judgment of the Circuit Court of Appeals should be reversed.

Harding v. Harding, *supra*, 335-341.

The Circuit Court arrived at the conclusion that the surety company was not in court when judgment against it was granted, that therefore such judgment was rendered without due process of law, no notice of the proceeding having been given the surety, and so held the judgment void, as conclusions drawn exclusively from the propositions stated in the Circuit Court's decision, to-wit, that the Singer Company was the principal under the contract, and that the reversal of the original judgment against it operated, as a matter of law, to dismiss the surety company from the proceedings.

Except for these propositions, in which the Circuit Court came squarely into conflict with the State court, the judgment here in question would not have been rendered. Indeed, the Circuit Court said:

> "We would concur in this opinion" (of the State court) "if the premise were granted that the surety company was in court at the time the trial court entered the judgment against it." (R. 260)

Also, the Circuit Court misconceived the ultimate holding of the State Supreme Court, and such misconception contributed to its judgment. After stating that certain of the former decisions of the Ninth Circuit Court, cited in the opinion, have no application because the judgment in question was without due process of law, and that the surety company did not have its day in the State court, the Circuit Court said as follows:

> "When it" (the surety company) "applied to the State district court to have the judgment vacated, it might have been bound by an adverse decision of that court if one had been rendered were it not for the fact, as subsequently determined by the Supreme Court of the State, that the District Court of the State *had no jurisdiction to consider the question at all;* that the Supreme Court of Idaho alone had jurisdiction to correct the error on appeal". (Emphasis ours.)
> (R. 263)

We submit this as an entire misconception. In passing, it should be noted that the Supreme Court did not characterize the *rendering* of the judgment on the undertaking as error. It merely stated that the judgment could be reviewed *for* error "*if there was error,* only by this court on appeal". (R. 55) The State court also held that the judgment creditors, petitioners here, had a right to submit the question of liability on the undertaking, and, which is more important, *construed* the undertaking to the point of determining and deciding, *that it presented a legitimate question for judicial determination.* Of still more importance in connection with the quotation last above, the Supreme Court emphatically did not hold that the trial court was without jurisdiction to determine whether or not the judgment was void. Finally, if, as the Circuit

Court of Appeals stated, an adverse decision by the trial court on the surety company's motion to vacate the judgment would have been binding on it, surely an adverse decision on that motion by the State court of last resort would be at least equally conclusive. That the State Supreme Court did render an adverse decision on that motion cannot, we submit, be doubted, and in support of this statement we submit its decision in its entirety. (R. 47-56)

In short, both the Federal and State courts are agreed that the surety company and its contract were in court originally, but the Federal Appellate Court has reviewed and reversed the decision of the State Supreme Court as to what, under the laws of the state, would operate to dismiss the surety company. It has placed its own construction upon the State statutes and the contract. That construction is the sole basis for the judgment which the Circuit Court of Appeals entered. In substance, the Circuit Court holds that the State trial court, in deciding the issue presented by petitioners' motion, should have consulted the undertaking and construed it, but that it was not empowered to place thereon its own construction; that the court should have taken the incorrect and misleading recitals of purported fact therein as controlling, instead of considering, as did both the trial and Supreme courts, the *conditions* therein stated upon which the surety company agreed to become liable, and the nature of the judgment and the appeal in the light of the pertinent state statutes.

We further respectfully submit that in all respects above presented, and under the authorities above cited, the Circuit Court was in error in that it exceeded its lawful authority, and in that it failed to give full faith and credit to the rulings, decision and judgment announced and rendered by the Idaho Supreme Court.

II.

DUE PROCESS WAS NOT DENIED

Assignment of Error V

The Circuit Court based its judgment exclusively on the proposition that due process of law was denied the surety company. As we have suggested in the first section of the brief, this conclusion was arrived at through a difference of opinion with the State Supreme Court as to several proposi-

tions of State law which controlled the ultimate decision. The Circuit Court relied almost entirely upon *National Exchange Bank v. Wiley*, 195 U. S. 257. That decision was taken as being based on the proposition that no notice was given Wiley before entering judgment. (R. 258) As we read that decision, and as we think this Court has since pointed out, the infirmity of that judgment lay solely in the fact that, whereas the consent of the maker was limited to a judgment in favor of the *holder* of the note, the plaintiff bank was not such holder, and was therefore a stranger to the contract itself and not entitled to present the issue, as to whether summary judgment might be had on the strength of the consent. Such being the *facts*, it was as though the bank were commencing a new, independent action, and it was therefore necessary to give Wiley notice before proceeding.

Baldwin v. Iowa Traveling Men's Assn., 283 U. S. 522.

In the case at bar, these petitioners were unquestionably the obligees to whom the contract of the respondent surety company ran. All rights under the contract belonged to them. They, and they alone, had a right to submit the issue of liability, and the statute itself provided that such issue should be sumbitted by motion. (App. A) We think it is obvious that these petitioners had a right to their day in court, there to present their claims, whether they were right or wrong. The question presented was purely one of law, and so could be determined only by judicial consideration and decision.

Gray v. Cotton, 174 Cal. 256.

If a judgment creditor may proceed without notice in one case of this type, we submit that he may so proceed in another. His right so to proceed can hardly rest upon the opinion of the surety as to whether or not he is obligated by his contract. Upon so proceeding, if the surety is not obligated, presumably the court will so find. If the court falls into error, it should be corrected by appeal.

Hawley v. Gray Bros., *supra;*

Baldwin v. American Surety Co., *supra;* (R. 55)

Upon this issue, we desire to call attention to a memorandum opinion of the late Judge Dietrich of the United

States Circuit Court of Appeals for the Ninth Circuit, who presided as the trial judge in *U. S. F. & G. V. Fort Misery Highway District*, and whose decision was affirmed by the Circuit Court in 22 *Fed.* (2d) 369, *supra*. This opinion is not contained in the Federal Reporter, but appears at pages 147 to 166, inclusive, in the transcript of the Fort Misery case in the Circuit Court of Appeals for the Ninth Circuit, being Case No. 5158, and is referred to and cited with approval by Judge Cavanah in his memorandum opinion herein. (R. 189) The question under consideration involved the same statute as here.

The language of that opinion is so apt, and we believe correct when applied to the case at bar, that we adopt it as a statement of the position of the petitioners herein.

> "In rendering both the primary judgment and the subsequent judgment upon the bond, it is, therefore, thought the Court was acting in the exercise of its general jurisdiction. By filing the bond purporting to be given under Sec. 7155, the Fidelity Company submitted itself to that jurisdiction. *And that is true whether the bond does or does not constitute a valid obligation.* Plaintiff thus in effect said to the Court that it entered its appearance for an adjudication of its rights and obligations under the bond. Any other view leads to an absurdity. It would operate to limit a court of general jurisdiction to the performance of a ministerial or a clerical, rather than a judicial function. It is a necessary attribute of such a court that it have the power to decide wrong, as well as right, and to determine questions of its own jurisdiction. If the state court has jurisdiction only in the case of a valid bond, and it is without the power preliminarily to determine this jurisdictional question, manifestly it is incapable of rendering a judgment in any case of a bond, which cannot be assailed for want of jurisdiction. *Its judgment could never be final.* ***** *And the same result would follow,* ***** *in case of a general appearance by the Company to resist judgment, for it contends that an invalid bond fails to confer jurisdiction* of the subject matter, as well as of the person. Undoubtedly, it was the duty of the Court not to render judgment upon this bond, if it was without consideration; but some tribunal must have the power to determine whether there

was or was not consideration. As is said in Fauntleroy v. Lum, 210 U. S. 230, 235: 'Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed.' See, also, to the same effect Burnet v. Desmornes, 226 U. S. 125. The power conclusively to decide whether such a bond is valid must be lodged in some competent tribunal, and clearly I think that power is possessed by the court in which it is filed. A surety thus enters appearance and submits to its jurisdiction both the person and the subject matter. In any other view the judgment so provided for, whether it be in favor of or against the surety, would be a futile thing, for in any case the defeated party could bring a plenary suit either in the same, or some other court, and by pleading the invalidity of the bond, compel an adjudication of that question *de novo*." (Emphasis ours.)

If the reasoning found in this decision of Judge Dietrich is sound, the hypothetical question to which he referred is actually realized in the case at bar. As pointed out in the State Supreme Court's opinion (R. 50-51) the contention of the surety company was, that the preliminary recitals of purported fact with which its contract opens, should govern its obligation, in spite of the fact that those recitals are grossly incorrect and misleading in that they ignore the record fact that the judgment appealed from was strictly a joint judgment and the appeal which the undertaking accompanied was strictly a joint appeal as much controlled by Anderson as by the Singer Company. On the other hand, these petitioners contended that mere recitals of fact in an undertaking never control the obligation, much less recitals which are incorrect and misleading, and that the obligation must be determined from the statement of conditions in the contract, for instance, where, as here, it recites that the appeal in question is from the whole of a joint judgment, calls for a stay of such joint judgment so appealed from, and agrees to pay any part of such joint judgment which may be affirmed. This, we submit, was plainly a question of law. If the State trial court was in error in holding that the

consideration of the surety company's obligation was a stay of the whole, joint judgment jointly appealed from, and that a partial affirmance thereof, such as had occurred, obligated the surety company, we submit that the rule quoted by Judge Dietrich from *Fauntleroy v. Lum, supra,* should have been applied by the Circuit Court of Appeals. The error, if any, should have been corrected on appeal from that judgment, not by a review and reversal thereof in the Federal courts.

The construction of a contract is always a matter of law for the court.

Gray v. Cotton, *supra;*
O'Conner v. West Sacramento County, 189 Cal. 7;
Verdi v. Helper State Bank, 57 Utah 502.

We submit that it can never be determined in advance of the submission of the creditor's motion, whether the surety is or is not obligated under the conditions stated in its undertaking. The first step is the presentation of the motion, and the issue for decision is thus presented. At that time, the surety who filed the undertaking has long ago become a party to the action. The court has jurisdiction then, or never. The consideration and construction of the contract comes later. Therefore, if notice to the surety is required in one instance, it is required in all. Conversely, if not required in all, it is required in none. We submit that to say otherwise, is to say that in an ordinary action on contract, the necessity of serving notice upon the defendant is to be determined by the outcome of the litigation; that if defendant proves to be liable on his contract he was not entitled to notice in the beginning; if it proves he was not liable, he was entitled to notice. The contention of the surety in the present case seems to be, that the State court should first have construed the contract in order to determine whether it had jurisdiction to construe it. This, we submit, is circular reasoning which leads nowhere.

In any event, the State District Court construed the contract in question and adjudged the surety company liable thereunder. That judgment stands unmodified and unreversed. Respondent contends that thee court should have looked to the contract to ascertain whether it had jurisdiction. If so, surely that court could place thereon its own construction. By the respondent's own contention, it was not

entitled to notice because its contract, which long ago merged into the judgment of the State court, obligated it to pay the original money judgment. If the State court had authority to construe the statement of conditions in respondent's undertaking, then the matter is res judicata, the surety is liable on its contract, and was therefore entitled to no notice of the proceeding against it.

Curtis v. Richards, et al., 9 Cal. 33, 38;*

Meredith v. S. C. M. A. of Baltimore, 60 Cal. 617;

Moffat v. Greenawalt, 90 Cal. 368;

Hawley v. Gray Bros. etc. Co., 127 Cal. 560;

Gray v. Cotton, 174 Cal. 256;**

Portland Trust Co., v. Havely, 36 Ore. 234;

Jewett v. Shoemaker, 124 Iowa 561;

Shannon v. Dodge, 18 Colo. 164;

U. S. F. & G. Co. v. Fort Misery Highway District, 22 Fed. (2d) 369. (9th C. C. A., construing Sec. 7155, I. C. S.);

And see: Pease v. Rathbun-Jones Eng. Co., 243 U. S. 273, *and cases there cited.*

Further, "the requirements of the 14th Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular State and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government."

Minder v. Georgia, 183 U. S. 559, 562.

No one has a vested right in any given mode of procedure, and so long as a substantial and efficient remedy remains due process of law is not denied. When an *opportunity* to be heard is provided, this satisfies the due process clause.

Crane v. Hahlo, 258 U. S. 142, 147.

The surety company should be held to have known the provisions of the statute pursuant to which its undertaking

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*This decision was written by Mr. Justice Field during his term as an associate justice of the Supreme Court of California.

**The several California decisions are cited for the reason that Idaho adopted the statute in question from California.

was executed, and pursuant to which it became a party to the action, by filing the undertaking. Having voluntarily appeared in the action, it surely was the surety's responsibility, and its duty as well, to take notice of the course of the proceedings, the steps taken, and of any limitations or periods of time provided by the statute, within which to act. It had ample opportunity to assert its claims. It had thirty days after the Supreme Court's decision in the original case within which to seek exoneration on its undertaking and its dismissal from the action. (App. A) The judgment creditor could take *no* action until that thirty-day period had passed. This respondent did nothing. Its situation is not, we believe, substantially different from that of a defendant who voluntarily enters an appearance without service of notice upon him, in an ordinary action on contract, and then fails to plead to the complaint, in reliance upon his own opinion that the contract shows that he is not liable. When thereafter the complainant proceeds because of such default, and obtains judgment, we submit that the defaulting party cannot be heard to complain that he was not specially notified of the proceeding for judgment by default.

Here the surety company was proceeded against by the established, statutory course of judicial procedure in the State courts.

After judgment, the surety had for ninety days the right of appeal and again failed to exercise its rights. (App. C) On such appeal, it could have submitted the question of jurisdiction.

Idaho Comp. Stat., Sec. 6693 (App. B);

Hauter v. Coeur d'Alene Min. Co., 39 Idaho 621, 634.

It chose instead to proceed against the judgment by motion. (R. 36-39) After an adverse decision on such motion in the appellate court, it undertook to appeal from the judgment. This appeal was dismissed because not taken within ninety days as provided by the State statute. *Baldwin v. Anderson, et al.,* ..... Ida. ....., 8 Pac. (2d) 461. It also commenced another proceeding in the lower court by which it sought to have the judgment amended. (R. 69-72) It also carried that proceeding to the appellate court and again a final adverse decision was rendered. (At this writing, this decision is not reported.) If it be assumed that the judgment on the undertaking was erroneous, and that it would

have been reversed had not respondent misconceived its remedy, that does not, we believe, have any bearing on the matter of due process. The due process clause does not control forms of procedure, or regulate practice, in the State courts.

Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 236;
Holmes v. Conway, 241 U. S. 624, 631.

Nor does hardship in an individual case work denial of due process. This is especially true where the party is charged with notice that the particular proceeding is provided for by the statutes of the State.

In the cited case next below, a non-resident of New Jersey acquired property in that State. The State law provided for the attachment of a non-resident's property for debt, and also, that if the property owner wished to appear to defend such an action against the property, he must furnish satisfactory bond guaranteeing the payment of the debt. It was held that this provision was not unconstitutional and did not deprive the owner of due process, particularly because he was charged with notice of that provision of the law when he acquired the property in that State.

Ownbey v. Morgan, 256 U. S. 94, 110, 111.

We believe that, in view of the original appearance of the surety (when its undertaking was filed); its first proceeding after judgment against it, by motion; its attempted appeal from the judgment a year later; and its second motion, also a year later, to amend the judgment, respondent has had its day in court.

Cooper v. Newell, 173 U. S. 556, 568;
Goldey v. Morning News, 156 U. S. 518.

When it first appeared and became a party, it accepted the terms of the statute which permitted its liability, if any, to be determined on summary proceedings by motion. (App. A)

> "That a man may contract to be bound by a judgment in which he has no right to be heard, and that a statute may authorize him to make himself a party to such a judgment, was decided, if it needed a decision, in *Beall v. N. Mex.*, 16 *Wall.* 535, 21 *L. Ed.* 292".
>
> United Surety Co. v. Am. Fruit Prod. Co., 238 U. S. 140.

See also:

Johnson v. Chicago & P. Elev. Co., 119 U. S. 388, 400-401.

Finally, we believe that any question of due process, so far as this case is concerned, is eliminated from the case by the decision of this court in *Baldwin v. Iowa Traveling Men's Association*, 283 U. S. 522, *supra*.

Therein, Mr. Justice Roberts, in discussing the question of jurisdiction, said:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

This opinion, so far as we have been able to ascertain, is the latest expression of this Court upon the question and is, we believe, controlling on the question of the State trial court's jurisdiction in the case at bar. Here the American Surety Company voluntarily litigated the question of jurisdiction, as a matter depending on State law as to the effect of its original appearance, and as to the proper meaning and effect of its contract, through the State court of last resort. It approached the question of jurisdiction again, from a different angle, in its motion to amend the judgment against it, in that it there sought first to have the judgment amended to show that the proceedings leading to the judgment occurred in chambers and not in open court, and then sought to have said judgment, after such amendment, vacated, on the grounds, first, that the court had no jurisdiction in chambers, and second, that no notice of the proceeding was given the surety company. (R. 70) That motion was also carried through the State court of last resort.

Baldwin v. American Surety Co., ... Idaho .....,
..... Pac. (2d) .....

Pac. Rep. Adv. Sheets, ..., 1932.

And see also:

Forsyth v. Hammond, 166 U. S. 506.

Had there been shown herein, when an injunction was sought in the Federal courts, some matter of *fact* which showed that these petitioners were not the parties in interest as regarded the respondent's undertaking, and therefore had no right to seek recovery on the contract, this, we submit, would have invoked the rule of the Wiley case, *supra*. But here there were only certain questions of law involved, as to the State courts' view of the proper construction of a contract, and hence the surety's liability or non-liability thereunder, which contract was purely a State contract written in accordance with a State statute, to be construed by the State courts under that and the State statutes relating to judgments and appeals. The trial court's judgment could have been no more than erroneous, and right decision is not a test of jurisdiction.

Faltz v. St. Louis, etc. R. Co., 60 Fed. 316;

Fauntleroy v. Lum, *supra;*

Quagon v. Biddle, 5 Fed. (2d) 608;

Flannigan v. Chapman, etc. Co., 144 Fed. 371.

We submit that the Circuit Court erred in reviewing and reversing the State Supreme Court as to the rules of State law announced in its decision, and hence came to an erroneous conclusion that due process had been denied. That conclusion was wholly the result of rules of State law announced by the Circuit Court, in conflict with the State court.

III.

WAIVER OF DUE PROCESS

Assignment of Error VI

If, upon this record and in the light of the authorities hereinbefore submitted, it can be assumed *arguendo* that there was a denial of due process in the first instance, in petitioners' proceeding by motion for judgment on the undertaking, we here make that assumption, for the purpose only of the closing section of this brief.

If due process were denied in the first instance, we believe the record shows plainly that such denial was waived by the

respondent surety company, at least twice and probably three times.

In its original motion attacking the judgment against it, the respondent submitted to the State court *not only the question of jurisdiction,* but the merits of the matter in their very essence. It contended, *first,* that the contract *should be construed as having stayed execution against the Singer Company only,* as not having stayed execution against that company's co-defendant, and submitted in support of that contention the entire records and files in the original action; *second,* that the contract should be *construed as one in which the sole consideration was an appeal by the Singer Company alone; third,* that the judgment was contrary to good conscience and equity because the contract should be held as executed *solely in consideration of an appeal by the Singer Company only,* and as staying execution against that company only, and *that it should be held that the Singer Company was the principal obligor in that contract,* and that this respondent was thereunder a secondary obligor merely. (R. 37-38)

That motion further sought the court's order *staying all proceedings upon execution, which proceedings were then under way.* Execution had issued, the sheriff had made a levy, and due notice of forthcoming sale had been given. (R. 38-41, 140-143)

While a special appearance, limited to challenging the jurisdiction only, is permitted in Idaho, *(Pingree v. Webb Co.,* 36 Idaho 442; *Pittenger v. Al G. Barnes Circus,* 39 Idaho 807) this respondent did not even profess to make such special appearance by the motion above referred to. It raised substantially every question involved in a consideration of the merits. In response thereto, the State Supreme Court decided a number of the questions raised, and even partly construed the whole contract, to the point of holding that it presented a legitimate question of liability, *for judicial determination.* We think it obvious that an appearance and a pleading in any proceeding *which invokes the jurisdiction and power of the court* in the matter of ordering execution proceedings to cease, is a general appearance. In an almost identical situation, in which it was sought to vacate a judgment and set aside execution proceedings, the Supreme Court of Idaho said:

"While he purported to appear specially, yet he sought to have the court pass upon non-jurisdictional as well as jurisdictional grounds. The object and only office of a special appearance is the presentation of a purely jurisdictional objection, and, as was held in the case of Burnham v. Lewis, 65 Kan. 481, 70 Pac. 377: 'An appearance in an action by a defendant for any purposes other than to contest the jurisdiction of the court will give the court general jurisdiction over such person for all purposes of litigation.'

"In Nelson v. Nebraska Loan & Trust Co., 62 Neb. 549, 87 N. W. 320, the court said: 'Whatever may have been the situation as to want of jurisdiction over the person of the plaintiff in error prior to the time he obtained leave to be made a party defendant and enter objections to the confirmation of sale, he thereby made a general appearance, and the court acquired jurisdiction over him for all purposes of the case. He has invoked the power of the court regarding other matters than that of challenging its jurisdiction over him, has made a general appearance, and waived all objections as to the manner in which he was brought into court.'

"When appellant appeared and moved that the sale under execution be set aside by reason of inadequacy of the sum paid for the property sold, he sought relief which could be granted only upon the hypothesis that the court had jurisdiction of the cause. The appearance was, therefore, a general appearance and gave the court jurisdiction over him for all purposes of the case."

Elliott & Healy v. Wirth, 34 Idaho 805, 806.

It should, we think, be especially noted that in the above case the appearance was made after judgment, just as in the case at bar.

In *Western L. Indemnity Co. v. Rupp*, 235 U. S. 261, this Court said:

"That a State, without violence to the 'due process' clause of the Fourteenth Amendment, may declare that one who voluntarily enters one of its courts to contest any question there pending shall be deemed to have submitted himself to the jurisdiction of the court for all

purposes of the action **** is settled by the decision of this court in York v. Texas, 137 U. S. 15; 34 L. Ed. 604; 11 Sup. Ct. Rep. 9; followed in Kauffman v. Wooters, 138 U. S. 285; 34 L. Ed. 962; Sup. Ct. Rep. 298."

We submit that, under the rule in Idaho, above quoted, the respondent waived any lack of due process, if any there were, by its appearance after judgment and its first motion, above summarized. Further, it appeared again and appealed from the judgment to the State Supreme Court. At practically the same time, it appeared and presented its motion to amend, and then vacate, the judgment against it. The appeal from the judgment was patently an attempt to open up every question on the merits. In the second motion, to amend the judgment, which as hereinbefore shown was also carried through the Court of last resort, we think it plain that any lack of due process was definitely waived. The respondent here contends that the judgment against it was void because of lack of notice at the time of the proceeding for such judgment. A void judgment is a nullity. It is legally non-existent. We contend that a litigant cannot be heard to say in one forum that a judgment against him is a void thing, and therefore legally non-existent, and to contend at the same time in a different forum, as was done here, that such judgment is subject to amendment by the trial court which entered it. A void judgment is not subject to amendment.

Elec. Boat Co. v. Howey, 89 N. Y. S. 210;
Schoellkopf v. Ohmeis, 32 N. Y. S. 736.

In addition to the foregoing, it is a general and well recognized rule that any appearance other than a special appearance strictly limited to the issue of the court's jurisdiction, is a general appearance and confers jurisdiction on the court for all purposes of the proceeding.

A demurrer setting up lack of jurisdiction and also that the complaint does not state facts sufficient to constitute a cause of action, waives any lack of jurisdiction.

St. Louis, etc. R. Co. v. McBride, 141 U. S. 127;
Nelson v. Huested, 182 Fed. 921.

A party cannot, at the same time, be both in and out of court. He cannot dispute the jurisdiction over his

person and at the same time dispute the merits of the matter.

Crawford v. Foster, 84 Fed. 939, 941.

An appearance for any purpose whatever other than the single, limited objection that the court has no jurisdiction *over the person,* is a general appearance.

Wabash Western Ry. Co. v. Brow, 65 Fed. 941, 949.

The last cited decision is of great interest and of greater weight, we believe, in that it was written by the late Chief Justice Taft, then of the Sixth Court of Appeals. It should be noted, we suggest, that a special appearance must be limited to the question of jurisdiction over the person.

The objection of no jurisdiction over the subject matter, in addition to the objection of no jurisdiction over the person, is a general appearance and waives lack of service of process or notice.

Mahr v. Union Pac. R. Co., 140 Fed. 92.

Here, respondent went far beyond the mere question of jurisdiction over the person.

It makes no difference that such an appearance is made after the entry of judgment. An appearance after judgment for any purpose other than to object to the jurisdiction is a general appearance.

Elliott & Healy v. Wirth, 35 Idaho 805, 806, *supra;*
Crane, et al. v. Penny, et al., 2 Fed. 187.

An appeal from a judgment of a trial court to a court of review is a submission to the jurisdiction, and whatever doubt may have existed as to the validity of the former judgment is removed by the judgment of the court of review.

Lawrence v. Nelson, 143 U. S. 215;
Benker v. Meyer, 154 Fed. 290, 295.

Any lack of process is waived

"when without the service of process a defendant in some manner indicates his intention to submit his person and cause to the jurisdiction of the court."

York v. State, 73 Tex. 651. Affirmed in York v. Texas, 137 U. S. 15.

We believe the rule is almost, if not quite, universal that a general appearance after judgment is a waiver of all objection to the jurisdiction or lack of process. In any event, we think there can be no doubt that, under the rule heretofore announced in Idaho and above cited, this respondent went far beyond the confines of a special appearance to question the jurisdiction only, and so appeared generally. If so, it should not now be heard to assert that any objection on the score of the Fourteenth Amendment is still open to it.

And see:

Pittenger v. Al G. Barnes Circus, *supra*, 39 Idaho 807, 811-812.

The record now before this court was submitted to the Court of Appeals. It there disclosed that the judgment against this respondent on its contract was entered June 23, 1930. (R. 27) Its first attack thereon, by motion to declare it void, was finally denied by the Idaho Supreme Court on May 2, 1931, remitted to the trial court June 3, 1931. (R. 56, 65) On June 18, following, this respondent filed its motion to amend the judgment against it, supporting it by a lengthy showing of fact. (R. 69-91)

While this last proceeding was pending in the State trial court, a bill of complaint was filed herein in the United States District Court. (R. 1, 132-133) While the case at bar was pending in the Federal District Court, the State trial court overruled respondent's motion to amend the judgment, and thereupon respondent appealed from that order, and took another appeal from the judgment itself. (R. 122, 126, 192) That is to say, the Federal District Court heard the matter on July 28, and the last of the various proceedings in State court just referred to, occurred on July 15th. Practically the entire record of all proceedings in State court up to that time was submitted to the Federal District Court. That court, speaking through Judge Cavanah, denied respondent's motion for a temporary injunction, struck certain irrelevant portions of the bill and sustained a motion to dismiss the bill. (R. 192-193) Later, upon respondent's refusal to amend

the bill or otherwise to plead further, a final decree was entered against this respondent. (R. 194)

We submit that the decree of the Federal District Court should be affirmed herein. We believe the authorities noted in Section I of this brief demonstrate that the only question here involved is one of due process. We believe the Circuit Court of Appeals was limited to the same question and was required, as a matter of law, to accept the rules of State law announced by the Supreme Court of Idaho in its decision against the surety company. We believe that the only question properly before the Circuit Court was whether, under the rules of state announced by the Supreme Court of Idaho, due process had been denied this respondent.

CONCLUSION

We submit, first, that there was no denial of due process, and second, that in any event there is not, and was not at the time the bill of complaint herein was filed, any question of due process open to this respondent, because of its several general appearances in the State court prior to commencing this action, and the resulting waivers of lack of jurisdiction in the State court, if any, theretofore existing. If either conclusion in the matter of due process is correct, then the Court of Appeals has failed to give full faith and credit to the judgment of the State courts and its judgment and order herein should be reversed. We further submit that the final decree of the Federal District Court should be affirmed.

Respectfully submitted,

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Counsel for Petitioners.

APPENDIX A

Section 7155 (4810). Same: Supersedeas: Money Judgment. If the appeal be made from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order, that if the judgment or order appealed from, or any part thereof, be affirmed or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within 30 days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent in his favor, against the sureties, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than $2000, and the sureties do not state in their affidavits of justification accompanying the undertaking, that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as, in their affidavits, they may state they are severally worth, and the judgment may be entered against the sureties by the court from which the appeal is taken pursuant to the stipulations herein designated. When the judgment or order appealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency.

APPENDIX B

Section 6693 (4178). When objections deemed waived. If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

APPENDIX C

Section 7151 (4802). Who may appeal: Designation of parties. Any party aggrieved may appeal in the cases prescribed in this code. The party appealing is known as the appellant, and the adverse party as the respondent.

Section 7152. Time for taking appeals. An appeal may be taken to the supreme court from a district court:

1. *From a final judgment in an action or special proceeding commenced in the court in which the same is rendered;* from a judgment rendered on an appeal from an inferior court; from a judgment rendered on an appeal from an order, decision or action of a board of county commissioners; within 90 days after the entry of such judgment. (Italics ours.)

2. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of place of trial; fro many special order made after final judgment; and from an interloctutory judgment in action for partition of real property; within 60 days after the order or interlocutory judgment is made and entered on the minutes of the court, or filed with the clerk.